No. 86-717

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

NAMACO INDUSTRIES, INC., - - - Petitioner,

versus

ROBART WOOD & WIRE PRODUCTS CORP. - - - - - - - - Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a United States District Court may give, pursuant to 28 U.S.C. § 1738, full faith and credit to, and enforce, a default judgment rendered by a state court which violates state and federal due process because the defendant was not provided with notice:

   (a) of the withdrawal of counsel, as mandated by applicable law;

   (b) to appoint other counsel, as mandated by applicable law; and

   (c) of the motion for default judgment, as mandated by applicable law.

2. Whether the United States Court of Appeals for the Fourth Circuit, when it held the default judgment of a state court was entitled to full faith and credit, erred in its refusal to consider whether the State judgment comported with due process.

3. Whether the United States Court of Appeals for the Fourth Circuit, when it held the default judgment of a state court was entitled to full faith and credit, erred in giving greater finality to the decision of the State court than the State court would have done.

LISTING AND DESIGNATION OF PARTIES

The caption of the case contains the names of the only two parties to this action. In the interest of simplicity, respondent and plaintiff below, Robart Wood & Wire Products Corp., shall hereinafter be referred to as "Robart Wood." Petitioner and defendant below, Namaco Industries, Inc. shall hereinafter be referred to as "Namaco."

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OFFICIAL AND UNOFFICIAL REPORTS

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2. *Robart Wood & Wire Products Corp.* v. *Namaco Industries, Inc.*, No. 83-3510 (S.D. W.Va. July 30, 1985)

STATEMENT OF JURISDICTION

The judgment for which review is sought was rendered by the United States Court of Appeals for the Fourth Circuit on August 5, 1986. Jurisdiction before the United States Supreme Court is founded upon 28 U.S.C. § 2101(c) (1949).

APPLICABLE STATUTORY AND CONSTITUTIONAL PROVISIONS

1. 28 U.S.C. § 1738 (1948).

   The Acts of the legislature of any State, Territory, or Possession of the United States, or copies, thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

   The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

   Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

2. U.S. Const. amend. XIV, § 1.

   Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. U.S. Const. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

4. N.Y. Civ. Prac. Law § 321 (McKinney).

(a) **Appearance in person or by attorney.** A party, other than one specified in Section 1201, may prosecute or defend a civil action in person or by attorney, except that a corporation or voluntary association shall appear by attorney. If a party appears by attorney he may not act in person in the action except by consent of the court.

(b) **Change of attorney.** An attorney of record may be changed by court order or, unless the party is a person specified in section 1201, by filing with the clerk a consent to the change signed by the retiring attorney and signed and acknowledged by the party. Notice of such change of attorney shall be given to the attorneys for all parties in the action or, if a party appears without an attorney, to the party.

(c) **Death, removal or disability of attorney.** If an attorney dies, becomes physically or mentally incapacitated, or is removed, suspended or otherwise becomes disabled at any time before judgment, no further proceeding shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs.

5. N.Y. Civ. Prac. Law § 3215 (McKinney).

(a) **Default and entry.** When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him. If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305, plus costs and interest. Upon entering a judgment against less than all defendants, the clerk shall also enter an order severing the action as to them. When a plaintiff has failed to proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the defendant may make application to the clerk within one year after the default and the clerk, upon submission of the requisite proof, shall enter judgment for costs. Where the case is not one in which the clerk can enter judgment, the plaintiff shall apply to the court for judgment.

(b) **Procedure before court.** The court, with or without a jury, may make an assessment or take an account or proof, or may direct a reference. When a reference is directed, the court may direct that the report be returned to it for further action or, except where otherwise prescribed by law, that judgment be entered by the clerk in accordance with the report without any further application. Except in a matrimonial action, no finding of fact in writing shall be necessary to the entry of a judgment on default. The judgment shall not exceed in amount or differ in type from that demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305.

(c) **Default not entered within one year.** If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

(d) **Place of application to court.** An application to the court under this section may be made, except where otherwise prescribed by local court rules, by motion at any trial term in which the action is triable or at any special term in which a motion in the action could be made. Any reference shall be had in the county in which the action is triable, unless the court orders otherwise.

(e) **Proof.** On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or sub-

division (a) of rule 316, and proof by affidavit made by the party of the facts constituting the claim, the default and the amount due. Where a verified complaint has been served it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or his attorney. When jurisdiction is based on an attachment of property, the affidavit must state that an order of attachment granted in the action has been levied on the property of the defendant, describe the property and state its value. Proof of mailing the notice required by section three hundred eight of the civil practice law and rules shall also be filed where such notice is required.

(f) **Notice.** 1. Notice is not required when the judgment may be entered by the clerk. Except as otherwise provided with respect to specific actions, if application must be made to the court, any defendant who has appeared is entitled to at least five days' notice of the time and place of the motion, and if more than one year has elapsed since the default any defendant who has not appeared is entitled to the same notice unless the court orders otherwise. The court may also dispense with the requirement of notice when a defendant who has appeared has failed to proceed to trial of an action reached and called for trial.

2. Where an application for judgment must be made to the court, the defendant who has failed to appear may serve on the plaintiff at any time before the motion for judgment is heard a written demand for notice of any reference or assessment by a jury which may be granted on the motion. Such a demand does not constitute an appearance in the action. Thereupon at least five days' notice of the time and place of the reference or assess-

ment by a jury shall be given to the defendant by service on the person whose name is subscribed to the demand, in the manner prescribed for service of papers generally.

(g) **Judgment for excess where counterclaim interposed.** In an action upon a contract where the complaint demands judgment for a sum of money only, if the answer does not deny the plaintiff's claim but sets up a counterclaim demanding an amount less than the plaintiff's claim, the plaintiff upon filing with the clerk an admission of the counterclaim may take judgment for the excess as upon a default.

(h) **Default judgment for failure to comply with stipulation of settlement.** 1. Where, after commencement of an action, a stipulation of settlement is made, providing, in the event of failure to comply with the stipulation, for entry without further notice of a judgment in a specified amount with interest, if any, from a date certain, the clerk shall enter judgment on the stipulation and an affidavit as to the failure to comply with the terms thereof, together with a complaint or a concise statement of the facts on which the claim was based.

2. Where, after commencement of an action, a stipulation of settlement is made, providing, in the event of failure to comply with the stipulation, for entry without further notice of a judgment dismissing the action, the clerk shall enter judgment on the stipulation and an affidavit as to the failure to comply with the terms thereof, together with the pleadings or a concise statement of the facts on which the claim and the defense were based.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

NAMACO INDUSTRIES, INC., - - - *Petitioner,*

v.

ROBART WOOD & WIRE PRODUCTS CORP., - - - - - - *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This petition for certiorari results from the determination by the United States Court of Appeals for the Fourth Circuit that default judgment entered by the Supreme Court of New York, County of Kings was entitled to full faith and credit under 28 U.S.C. § 1738 (1948).

From the record, the facts material to the questions presented are as follows:

1. On March 9, 1978, Robart Wood instituted an action against Namaco in the Supreme Court of the State of New York, County of Kings, styled "*Robart Wood & Wire Products Corp.* v. *Eclipse Sleep Prod-*

ucts, Inc. and National Mattress Co., Inc." National Mattress Co., Inc., a West Virginia corporation with its principal place of business in Huntington, West Virginia, is now, by change of name, Namaco Industries, Inc. (hereinafter "Namaco").

2. Namaco employed the firm of Redleaf, Ain, Geduldig & Farinacci, P.C. to represent it in the New York action and the firm entered an appearance for Namaco on April 4, 1978.

3. On or about October 1, 1982, the Supreme Court of the State of New York (hereinafter "state court") approved an order authorizing the firm of Redleaf, Ain, Geduldig & Farinacci, P.C., to withdraw as counsel for Namaco in the New York action. N.Y. Civ. Prac. Law § 321(b) (McKinney) mandates that an attorney of record provide notice to his or her client before withdrawing from representation. Namaco never received notice of the attorney's motion to withdraw.

4. On or about November 9, 1982, an application for default judgment was made in the New York action. The application was served on the firm of Redleaf, Ain, Geduldig & Farinacci, P.C. more than one month after the firm had withdrawn as counsel for Namaco in that action. The application was never served on Namaco.

5. On or about December 15, 1982, an order granting default judgment against both defendants in the New York action was signed and entered. Although N.Y. Civ. Prac. Law § 321(c) (McKinney) mandates an absolute stay of further proceedings in an action

when counsel is removed before judgment until thirty (30) days after notice to appoint another attorney has been served upon the unrepresented party, the motion for default judgment and attachments, and the order granting judgment clearly reveal no such notice to appoint other counsel was ever served upon Namaco in the New York action.

6. On December 29, 1982, an order was entered granting Robart Wood judgment in the amount of $15,213.82 against Namaco.

7. On January 9, 1983, Robart Wood brought this action in the United States District Court for the Southern District of West Virginia (hereinafter "District Court"), seeking to enforce the judgment of the state court. Jurisdiction was asserted under 28 U.S.C. § 1332 (1964) on the basis that Robart Wood is a corporation organized, existing and having its principal place of business in a State other than West Virginia, that Namaco is a corporation organized, existing and having its principal place of business in West Virginia, and that the amount in controversy, exclusive of interest and costs exceed $10,000.00.

8. By a memorandum opinion and order entered July 30, 1985, by the District Court, Robart Wood's motion for summary judgment was denied. Following Robart Wood's motion for reconsideration, which stipulated that Namaco in the New York action had received no notice of its attorney's motion to withdraw, and following a hearing on the motion, an order was entered by the District Court on October 10, 1985

denying Robart Wood's motion for reconsideration and dismissing its complaint.

9. On October 23, 1985, Robart Wood filed its notice of appeal to the United States Court of Appeals for the Fourth Circuit (hereinafter "Court of Appeals"). The matter was heard by the Court of Appeals on April 10, 1986 and on August 5, 1986 the court reversed the judgment of the District Court and held that the state court judgment was entitled to full faith and credit. The Court of Appeals based its judgment on its determinations that the state court had personal jurisdiction over the parties, jurisdiction over the subject matter, and that the state court judgment appeared regular of its face and was properly certified and authenticated. The Court of Appeals refused to consider Namaco's allegations that minimum due process had not been accorded to it in the state court.

ARGUMENT

A judgment sought to be enforced under 28 U.S.C. § 1738 (1948) (hereinafter "§ 1738") may be challenged on the ground that the court rendering the judgment lacked jurisdiction or that the judgment was rendered without minimal procedural due process. In the case at bar, Namaco was denied notice required by law and by due process in three separate instances. Namaco was denied due process when it was given no notice that its counsel moved to withdraw from representation, when Robart Wood failed to give a mandated thirty day notice to obtain substitute counsel,

and when Robart Wood failed to give it notice of Robart Wood's motion for default judgment.

The United States Court of Appeals for the Fourth Circuit, despite clear law to the contrary, refused to consider whether the original state court judgment was rendered in compliance with minimum due process. Additionally, the Court of Appeals accorded the decision of the state court greater finality than would the court rendering the decision. In so doing, the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervision. U.S. Sup. Ct. Rule 17.1(a), 28 U.S.C. (1984).

I. A Judgment Is Not Enforceable Under 28 U.S.C. § 1738 Unless the Court Rendering Judgment Observed Minimum Due Process.

Robart Wood's only contention in its brief to the Court of Appeals was that the state judgment must be given full faith and credit. The sole support for this contention was the argument that the state court had jurisdiction over the parties and subject matter at the time of the judgment. Through the years, however, judicial interpretation of the full faith and credit clause of the Constitution and § 1738 has mandated that before a judgment is accorded full faith and credit, the judgment must have been obtained in a proceeding which satisfies minimal procedural due process requirements of the Fourteenth Amendment's Due Process Clause. The rule has been succinctly stated by this Court:

> "The State must, however, satisfy the applicable requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment. Section 1738 does not suggest otherwise; other state and federal courts would still be providing a state judgment with the 'same' preclusive effect as the courts of the State from which the judgment emerged. In such a case, there could be no constitutionally recognizable preclusion at all."

Kremer v. *Chemical Construction Corp.*, 456 U. S. 461, 482 (1982).

Thus, if the judgment sought to be enforced was obtained without attention to procedural due process, that judgment may not be enforced in a subsequent federal action.

II. Notice Is An Essential Element of Procedural Due Process.

Although the parameters of procedural due process can never be entirely stated and defined, it is undisputed that parties whose rights are to be affected have a right to be heard, and in order to enjoy that right they must first be notified. Notice is an essential element of due process. 16A Am. Jur. 2d *Constitutional Law* § 827 (1979). As stated by this Court:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they re-

> quire that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."

Mullane v. *Central Hanover Bank and Trust Company,* 339 U. S. 306, 313 (1950); see *Goss* v. *Lopez,* 419 U. S. 565, 578 (1975); *Fuentes* v. *Shevin,* 407 U. S. 67 (1972).

The rule that notice is a necessary requirement of an enforceable foreign judgment is well articulated in Restatement (Second) of Judgments § 81 (1982):

> "A judgment rendered in one state and relied upon as the basis of a claim or defense in a subsequent action in another state may be avoided in the subsequent action on the ground that the judgment was rendered without compliance with the requirements stated in § 1, i.e., that the court rendering the judgment have had territorial jurisdiction and jurisdiction of the subject matter of the action, and that *adequate notice* have been afforded."

Emphasis added.

Under the due process clause, the requirement of adequate notice applies to all types of proceedings. Restatement (Second) of Judgments § 2 comment a (1982).

III. In Three Instances, the State Court Failed to Provide the Notice Mandated by Its Own Laws and by Procedural Due Process.

A. THE STATE COURT PERMITTED THE WITHDRAWAL OF COUNSEL FOR NAMACO WITHOUT NOTICE TO NAMACO.

As stated above, Robart Wood stipulated in the District Court that no notice was provided to Namaco of the motion of Namaco's counsel to withdraw. This lack of notice violates New York's own statutory requirements. N.Y. Civ. Prac. Law 321(b) (McKinney) demands that an attorney withdraw only after notice to his or her client. See *J.C.S. Design Associates, Inc.* v. *Vinnik,* 445 N.Y.S. 2d 717 (App. Div. 1981); *Bucaro* v. *Keegan, Keegan, Hecker & Tully, P.C.,* 483 N.Y.S. 2d 564 (Sup. Ct. 1984); *Isser* v. *Berg,* 239 N.Y.S. 2d 370 (Sup. Ct. 1963); *Mambrino* v. *State,* 221 N.Y.S. 2d 643 (Ct. Cl. 1962).

The rule that counsel can withdraw only upon notice to his or her client is well recognized. *ITT Industrial Credit Co.* v. *Lawco Energy, Inc.,* 86 F.R.D. 708 (S.D. W.Va. 1980). The rationale which supports it is sensible and consistent with due process. When a client obtains counsel, he relies upon counsel to keep him currently informed about the status of the case. This reliance is usually complete. To permit counsel to withdraw without notice to the client leaves him without any opportunity to defend himself in the action. Clearly a judgment rendered in these circumstances does not comport with minimal procedural due process.

In the instant case, default judgment was rendered after Namaco's counsel withdrew. Had Namaco been apprised of the withdrawal motion it could have obtained other counsel to resist the complaint and avoid default judgment. The state court had a responsibility to ensure that the client is notified of counsel's intention to abandon the matter so that no action may be taken to prejudice the client's position in the absence of counsel. Having failed to do so, the state court denied Namaco minimal due process.

B. THE STATE COURT PERMITTED THE ACTION TO PROCEED WITHOUT THE THIRTY DAY NOTICE TO OBTAIN COUNSEL MANDATED BY N.Y. CIV. PRAC. LAW § 321(c).

N.Y. Civ. Prac. Law § 321(c) states that if an attorney dies, becomes incapacitated, is removed, suspended or otherwise disabled at any time before judgment, no further proceeding shall be taken in the action against the party for whom the attorney appeared until thirty days after notice to appoint another attorney has been served upon that party. The phrase "or otherwise becomes disabled" has generally been interpreted to include instances where an attorney voluntarily withdraws . *In re Weinman,* 264 N.Y.S. 2d 456 (Surr. St. 1965); *In re Von Bargen's Estate,* 243 N.Y.S. 2d 328 (Surr. Ct. 1963); *Thomas* v. *Thomas,* 34 N.Y.S. 2d 320.

This statute was obviously designed to protect a litigant who has been deprived of the services of his counsel and to give him a reasonable opportunity to obtain another lawyer before further proceedings are

taken against him in the action. *Franklin National Bank* v. *Lake Credit Corp.*, 297 N.Y.S. 2d 288 (Sup. Ct. 1969). Although the legislature recognized the need for such notice, the state court again failed to observe its own statutes as well as minimal due process. The record establishing the alleged right to the original default judgment omits any reference to the mandated notice to obtain other counsel.

Other New York courts have, time after time, vacated default judgments rendered without the required thirty-day notice, holding that the command of the statute is absolute. *In re Von Bargen's Estate, supra; Franklin National Bank* v. *Lake Credit Corp., supra; Wolf* v. *Schenker,* 151 N.Y.S. 2d 197 (App. Ct. 1956); *Feola* v. *Moore McCormack Lines, Inc.,* 475 N.Y.S. 2d 867 (App. Div. 1984). By again failing to provide Namaco with proper notice the state court denied to it minimal procedural due process.

C. THE STATE COURT GRANTED THE DEFAULT JUDGMENT MOTION OF ROBART WOOD WITHOUT NOTICE OF THE MOTION FOR DEFAULT JUDGMENT MANDATED BY NEW YORK STATUTE AND BY PROCEDURAL DUE PROCESS.

N.Y. Civ. Prac. Law § 3215(f) mandates at least five days notice on an application for default judgment. Such a notice of motion pursuant to § 3215 was prepared by Robart Wood, however, the record reveals that it was served upon Namaco's former counsel, Redleaf, Ain, Geduldig & Farinacci, P.C. a month *after* that firm had withdrawn from representation. Having withdrawn from the case the firm could no longer ac-

cept service on behalf of Namaco. In addition, Namaco received no notice that default judgment was being sought. Indeed it did not even know its counsel had withdrawn.

In circumstances where the notice mandated by § 3215 is not provided, the New York courts have vacated default judgments. *Rivera* v. *LaPorte,* 466 N.Y.S. 2d 606 (Sup. Ct. 1983); *Pruna* v. *Giacobbe,* 249 N.Y.S. 2d 387 (Sup. Ct. 1964). In *Rivera* v. *LaPorte,* the court recognized that the five day notice required by § 3215 rises to the level of minimal due process. A contrary view would be inconsistent with basic standards of fundamental fairness and due process of law.

IV. The Court of Appeals Erroneously Refused to Consider Whether the State Court Decision Comported with Due Process Despite This Court's Clear Statement That Full Faith and Credit May Not Be Given to a Decision Rendered Without Due Process.

In its brief and in the hearing before the Court of Appeals, Namaco argued that the decision of the state court, which Robart Wood sought to enforce under § 1738, had been rendered without due process and was therefore not entitled to full faith and credit. These arguments have been articulated above. The Court of Appeals clearly discloses its refusal to analyze the state decision in light of the requirements of due process by stating:

> "Namaco now concedes that the New York court had personal jurisdiction over it and subject matter jurisdiction over the controversy. The judgment of that court is regular on its face, it has been properly certified and authenticated.

> Under these circumstances, 28 U.S.C. § 1738 requires the United States District Court for the Southern District of West Virginia to extend full faith to the judgment of the New York court."

Robart Wood & Wire Products Corp. v. *Namaco Industries, Inc.*, 797 F. 2d 176, 178 (4th Cir. 1986).

As noted above, the recognized prerequisites to an enforceable judgment under § 1738 are personal jurisdiction over the parties, jurisdiction over the subject matter, *and compliance with minimum due process. Milliken* v. *Meyer*, 311 U. S. 457 (1940); *Kremer*, 456 U. S. 461. Although the Court of Appeals properly inquired into the first two necessary elements, it substituted for the due process evaluation a finding that the judgment appeared regular on its face and had been properly certified and authenticated. The Court of Appeals then terminated its inquiry. In so doing the Court of Appeals eliminated one of the three vital prerequisites to full faith and credit. Thus, the Court of Appeals totally ignored this Court's decision in *Kremer* and must, therefore, be reversed.

V. The Court of Appeals Gave Greater Finality and Conclusiveness to the New York Judgment than Would the Courts of New York and Therefore Violated Standards of Full Faith and Credit.

As stated in § 1738, and echoed in the opinions of this Court, the decision of a court is entitled to the *same* full faith and credit before the courts of other jurisdictions as it would have had in the courts of the state rendering the decision. 28 U.S.C. § 1738; *Kremer*, 456 U. S. 461. A federal court asked to extend

full faith and credit to the decision of a state court may give to the state court's decision only the finality and conclusiveness which state law and applicable constitutional provisions permit, neither more nor less. The Court of Appeals, in its decision, failed to adhere to this basic principle.

On appeal, and as articulated in Argument, Section III, above, Namaco argued that because of the procedural errors and denial of minimum due process, the decision rendered by the state court would not be enforceable in New York. In such circumstances this Court has held that the judgment of a state court is not entitled to full faith and credit by stating:

> "A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment. Section 1738 does not suggest otherwise; other state and federal courts would still be providing a state court judgment with the 'same' preclusive effect as the courts of the State from which the judgment emerged. In such a case, there could be no constitutionally recognized preclusion at all."

Kremer, 465 U. S. at 482.

When presented with authority indicating the New York judgment would be unenforceable in New York, the Court of Appeals stated:

> "On appeal, Namaco also argues that, because of alleged violations of New York procedural laws, the New York courts would not enforce this judgment. That may be, but the place to attack the

> New York judgment is in New York, not in the Southern District of West Virginia."

Robart Wood & Wire Products Corp., 797 F. 2d at 178.

Thus, the Court of Appeals has given the New York judgment greater conclusiveness and finality in the District Court than such judgment would have been accorded under the laws of the state of New York. This is error and demands reversal.

CONCLUSION

The judgment rendered in the state court resulted from severe procedural errors all of which denied Namaco, a West Virginia corporation, notice of proceedings and which left it absolutely defenseless before the New York court. Although the State of New York had statutory rules which would have protected Namaco, these rules were not observed. Namaco was denied minimal procedural due process by the state court's failure to observe existing rules of notice. *Kremer,* 456 U. S. 461; *L & W Air Conditioning Co., Inc.* v. *Varsity Inn of Rochester, Inc.,* 371 N.Y.S. 2d 997 (Sup. Ct. 1975).

The United States Court of Appeals for the Fourth Circuit, in its review of the judgment of the state court violated clearly articulated and binding precedent by (a) refusing to evaluate whether the judgment was rendered in compliance with due process and (b) giving the judgment finality which it would have been denied by law in New York.

Therefore, Namaco Industries, Inc., respectfully urges this Court to reverse the decision of the Court of Appeals and to affirm the decision of the United States District Court for the Southern District of West Virginia, which properly held the state court judgment was not entitled to full faith and credit.

Respectfully submitted,

/s/

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PROOF OF SERVICE

The undersigned, of counsel for the petitioner and member of the Bar of this Court, does hereby certify that the foregoing Petition for Certiorari has been served in compliance with U. S. Sup. Ct. Rule 28.3 upon all parties required to be served by depositing three copies of the document in a United States Post Office, first-class postage prepaid, addressed to the following counsel of record at his post office address.

William D. Levine
Marshall and St. Clair
717 Sixth Avenue
Huntington, West Virginia 25701

Done the 30th day of October, 1986.

/s/

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-2195

ROBART WOOD & WIRE PRODUCTS CORP., - - - - - - - - - *Appellant,*

v.

NAMACO INDUSTRIES, INC., formerly known as NATIONAL MATTRESS COMPANY, INC., - - *Appellee.*

Appeal from the United States District Court for the Southern District of West Virginia at Huntington. Robert J. Staker, District Judge. (85-3510)

Argued: April 10, 1986 Decided: August 5, 1986

Before RUSSELL and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

William D. Levine (Marshall and St. Clair on brief) for Appellant; E. M. Kowal, Jr. (Cheryl L. Connelly; Charles F. Bagley, III; Campbell, Woods, Bagley, Emerson, McNeer and Herndon on brief) for Appellee.

CHAPMAN, Circuit Judge:

Plaintiff, Robart Wood & Wire Products Corp. (Robart), filed this action in the United States District Court for the Southern District of West Virginia to enforce the

judgment it had obtained against Namaco Industries, Inc. (Namaco), in the courts of New York. Namaco contested the validity of the New York judgment, arguing that the New York proceedings did not meet due process requirements. The district court agreed and dismissed Robart's complaint. Robart has appealed arguing that 28 U.S.C. § 1738 (1982) requires that the district court give full faith and credit to the New York judgment. We agree and, therefore, reverse.

I

Robart brought suit in New York against Eclipse Sleep Products, Inc. and Namaco seeking to recover $11,120.02 for goods delivered to these defendants. The defendants were served with a summons on March 16, 1978. On April 4, 1978, the law firm of Redleaf, Ain, Geduldig and Farinacci, P.C., entered an appearance on behalf of both defendants and demanded service of a copy of the complaint. Settlement negotiations began and continued for several years. On May 7, 1982, apparently after negotiations had reached an impasse, counsel for Robart served a verified complaint upon counsel for the defendants. On October 1, 1982, nearly five months later, the court permitted Redleaf, Ain, Geduldig and Farinacci, P.C., to withdraw as counsel for the defendants. The order permitting withdrawal recites that the defense counsel had provided proof of service of the withdrawal motion upon the defendants.

On November 9, 1982, Robart's counsel sent notice of an application for a default judgment to Redleaf, Ain, Geduldig and Farinacci, P.C., this notice stated that a hearing was to be held on November 23, 1982. On December 2, 1982, counsel for Robart sent a "Notice of Settlement" to Redleaf, Ain, Geduldig and Farinacci, P.C. indicating that an order would be presented for settlement before the New

York Supreme Court on December 8, 1982. Subsequently, the New York Supreme Court entered a default judgment against the defendants jointly and severally in the sum of $11,120.02, plus interest and costs.

In an attempt to enforce this judgment, Robart initiated the instant action in the United States District Court for the Southern District of West Virginia. Robart moved for summary judgment on the basis that it had a valid judgment of the New York courts which was properly authenticated and thus entitled to full faith and credit in the Southern District of West Virginia. Namaco opposed summary judgment on two grounds. First, Namaco argued that the New York court lacked personal jurisdiction over it. Second, Namaco asserted that its procedural process rights were violated in the New York court proceeding because it received no notice that the law firm of Redleaf, Ain, Geduldig and Farinacci, P.C., was withdrawing from the case. For this reason Namaco argued that the New York judgment was void.

The district court held that Namaco's first argument was without merit because counsel for Namaco had entered a general appearance in the New York proceeding, thus consenting to the court's personal jurisdiction. The district court, however, agreed with Namaco that lack of notice of its counsel's withdrawal cast a shadow over the validity of the New York judgment. The district court, therefore, held that there was a genuine issue of material fact and summary judgment would be inappropriate.

Robart moved the district court to reconsider its decision on the motion for summary judgment. For the purposes of its motion to reconsider, Robart stipulated that Namaco never received notice of its attorney's motion to withdraw. Robart argued that Namaco had chosen its counsel and empowered the counsel to appear on its behalf. Thus, any failure of counsel to protect Namaco's rights was

a matter between Namaco and its counsel, and did not require the relitigation of Robart's claim. The district court denied Robart's motion for reconsideration because the court was not satisfied that Namaco had been afforded the process which New York law required in the New York court proceedings.

Robart has appealed the denial of its motion to reconsider. The sole issue presented for review is whether the district court erred in refusing to give full faith and credit to Robart's New York judgment. We are convinced that the district court erred, and we reverse.

II

Title 28 U.S.C. § 1738 requires that full faith and credit be given by the federal courts to the judicial proceedings of every state, territory or possession. The purpose for this clause is to establish, throughout the federal system the salutary principal of the common law that once litigation is pursued to judgment, that judgment shall be as conclusive of the rights of the parties in every other court as in the court where the judgment was rendered. *Milwaukee County* v. *White Co.* 296 U. S. 268 (1935). The burden, therefore, of undermining the decree of a state rests heavily upon the assailant. *Williams* v. *North Carolina*, 325 U. S. 226 (1945).

Namaco now concedes that the New York court had personal jurisdiction over it and subject matter jurisdiction over the controversy. The judgment of that court is regular on its face, it has been properly certified and authenticated. Under these circumstances, 28 U.S.C. § 1738 requires the United States District Court for the Southern District of West Virginia to extend full faith to the judgment of the New York court. On appeal, Namaco also argues that, because of alleged violations of New York

procedural laws, the New York courts would not enforce this judgment. That may be, but the place to attack the New York judgment is in New York, and not in the Southern District of West Virginia. Persuaded, therefore, that the district court erred in failing to extend full faith and credit to this judgment, we reverse.

REVERSED.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

Civil Action No. 83-3510

ROBART WOOD & WIRE PRODUCTS CORP., - - - - - - - - - *Plaintiff,*

v.

NAMACO INDUSTRIES, INC., formerly known as NATIONAL MATTRESS COMPANY, INC., - - *Defendant.*

MEMORANDUM OPINION AND ORDER

Entered July 30, 1985

Plaintiff, Robart Wood & Wire Products Corp. (Robart), brought this diversity action to enforce a judgment it had obtained against defendant Namaco Industries, Inc. (Namaco), formerly known as National Mattress Company, Inc., in New York state court. Namaco contests the validity of the New York judgment, arguing that the New York court lacked personal jurisdiction over it, or in the alternative, that the New York proceedings did not comport with minimal due process requirements. Robart, on the other hand, asserts that the New York judgment is a valid judgment entitled to full faith and credit. This matter is now before the court upon the motion of the plaintiff for summary judgment. The following facts are garnered from the pleadings, affidavits and exhibits of record.

Robart instituted suit against Eclipse Sleep Products, Inc., and Namaco, seeking to recover $11,120.02 for goods

delivered to defendants, by causing a summons to be issued by the Supreme Court of the State of New York for the County of Kings on March 9, 1978, directing the defendants to serve a notice of appearance upon Robart's counsel. Service of the summons was had upon both the defendants on March 16, 1978, by personally delivering a copy of the summons with one Jane Levine, who is certified by the process server to be the "managing agent" of defendants.

On April 4, 1978, the law firm of Redleaf, Ain, Geduldig & Farinacci, P.C., entered an appearance on behalf of both defendants and demanded service of a copy of the complaint. Some four years later on May 7, 1982, apparently after settlement negotiations had reached an impasse, counsel for Robart served a verified complaint upon counsel for defendants. Thereafter, by order entered October 1, 1982, by the Honorable Irving P. Kartell, the firm of Redleaf, Ain, Geduldig & Farinacci, P.C., was permitted to withdraw as counsel for defendants. The order permitting withdrawal recites that proof of service of the withdrawal motion upon the defendants was provided by defense counsel.

On November 9, 1982, notice of an application for default judgment was sent by counsel for Robart to Redleaf, Ain, Geduldig & Farinacci, P.C., indicating that a hearing was to be held November 23, 1982. On December 2, 1982, a "notice of settlement" was sent by counsel for plaintiff to Redleaf, Ain, Geduldig & Farinacci, P.C., indicating that an order would be presented for settlement before the Honorable J. Pino on December 8, 1982. The nature of this order is not disclosed in the record. On December 15, 1982, Justice Pino entered an order granting plaintiff's application for default judgment and ordering the clerk to enter judgment for the plaintiff. Thereafter, on December 29, 1982, judgment was entered against the defendants jointly and severally in the sum of $11,120.02 plus interest

and costs. It is this judgment which Robart seeks to enforce in this action.

Pursuant to U. S. Const. Art. IV, § 1, and its statutory counterpart, 28 U.S.C. § 1738, the records and judicial proceedings of any court in any State, Territory or Possession of the United States, when properly authenticated, are entitled to the same full faith and credit in other courts within the United States as they have in the State, Territory or Possession in which they are taken. It has been long established, however, that the requirement of full faith and credit must be read in light of other constitutional provisions which it was never intended to modify or override. *See, e.g., Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111, 134 (1912). Thus, while a properly authenticated judgment of another state is presumptively valid in this court, its validity may be challenged here on grounds that the court rendering judgment lacked personal jurisdiction over the defendant, *see, e.g., Underwriters National Assurance Co.* v. *North Carolina Life*, 455 U. S. 691, 704 (1982); *Durfee* v. *Duke*, 375 U. S. 1 (1963); *Western Union Tel. Co.* v. *Pennsylvania*, 368 U. S. 71 (1961), or that the proceedings failed to comport with due process requirements, *see, e.g., Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461, 481-483 (1984); *Hanson* v. *Deckla*, 357 U. S. 235 (1958); *Lee* v. *Winston*, 717 F. 2d 888 (4th Cir. 1983). *See generally*, 47 Am. Jur. 2d, *Judgments* §§ 1221, 1254 (1969). The party attacking the validity of a foreign judgment bears the burden of demonstrating its invalidity. *See, e.g., Sutton* v. *Leib*, 342 U. S. 402, 408 (1952), *reh. den.* 343 U. S. 921 (1952).

In this case Namaco makes two arguments. First, it contends that the New York court lacked personal jurisdiction over it and therefore the judgment should not be accorded full faith and credit. Second, Namaco asserts that it was not accorded minimal procedural due process

in the New York court, thus invalidating the judgment. Namaco's first contention is without merit. Even when Namaco's assertion of improper service of process is taken as true, it apparently remains undisputed that counsel for Namaco nevertheless made a general appearance in the New York proceedings, thus consenting to that court's personal jurisdiction. *See, e.g., Johnson* v. *Huntington Moving & Storage, Inc.*, 160 W. Va. 796, 239 S.E. 2d. 128 (1977) (defendant who made appearance even though not served could not be heard to complain in subsequent action in another jurisdiction to collect judgment, even if misnamed in original proceeding). Namaco's due process argument, however, is not so easily dismissed.

Namaco argues that it's due process rights were violated in the New York proceedings because the default judgment was obtained after the withdrawal of counsel without notice to Namaco. This argument is supported by the affidavit of George Faudree, Vice President of Finance for Namaco, who states that Namaco received no notice of the withdrawal of the firm of Redleaf, Ain, Geduldig & Farinacci, P.C., from the New York proceedings. This court agrees that the lack of such notice could seriously place in question the validity of the New York judgment. The New York rules of procedure themselves require that an attorney of record may withdraw only after notice to his client. N.Y. CIV. PRAC. LAW § 321[b] (McKinney). This court itself has refused to permit withdrawal of counsel when no notice has been given to the client. *See ITT Industrial Credit Co.* v. *Lawco Energy, Inc.*, 86 F.R.D. 708 (S.D. W.Va. 1980).

While the order permitting withdrawal of Messrs. Redleaf, Ain, Geduldig & Farinacci as counsel for Namaco recites that proof of service of the withdrawal motion upon Namaco and the other defendant was provided by defense counsel, the affidavit of George Faudree raises a genuine

issue of material fact that such notice actually occurred,[1] thus precluding summary judgment.

For the foregoing reasons, it is hereby ORDERED that the motion of the plaintiff for summary judgment be, and the same hereby is, DENIED and OVERRULED.

The clerk of the court is directed to mail a certified copy of this order to all counsel of record.

ENTER:

(s) Robert J. Staker
Robert J. Staker
United States District Judge

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[1]The court notes further that even after withdrawal of defense counsel, the plaintiff continued to treat Redleaf, Ain, Geduldig & Farinacci as counsel for Namaco. Indeed, so far as the court can ascertain from the sketchy record, the only notice sent in connection with Robart's motion for default judgment was sent to the aforementioned counsel for defendants, even though they had already withdrawn as counsel more than a month earlier.